

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: September 23, 1979

Case No. 96 INA 079

In the Matter of:

R & D, INC, T/A/ DUNKIN' DONUTS,
Employer

on behalf of

LOURDES TOLENTINO,
Alien

Appearance: J. J. Hykel of Philadelphia, Pennsylvania

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of LOURDES TOLENTINO (Alien) by R & D, INC, T/A/ DUNKIN' DONUTS (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability at that time and place.²

STATEMENT OF THE CASE

Employer, R & D, Inc., T/A Dunkin' Donuts, applied for labor certification on behalf of the Alien for the position of "Cook, Pastry." AF 41. Employer listed the following duties for the position:

prepare and bake cakes, doughnuts, pastries, and other baked goods, such as doughnuts, eclairs, muffins, croissants, munchkins, cookies, macaroons, brownies, etc., according to recipes; measure ingredients using measuring cups and spoons; mix ingredients to form dough for cookies and fancy pastries using dough roller and cookie cutter or by hand. Place shaped dough portions in greased or floured pans and insert them in the oven using long-handled paddle. Adjust drafts or thermostatic controls to regulated oven temperatures. Prepare and cook ingredients for fillings or other pastries. Pour filling into cake and doughnut shells and top filling with meringue and cream. Mix ingredients to make icings. Decorate cakes and pastries. Blend colors for icings and shaped sugar ornaments and statuaries.

AF 41. Employer offered \$10.75 per hour for this 35 hour a week position, with time and a half for overtime. The qualifications were a high school education and two years of experience in the job offered. AF-41.

Notice of Findings. Pursuant to the Notice of Findings (NOF) issued by the Certifying Officer (CO) on July 3, 1995, this job was changed from Cook, Pastry, which has a two to four year experience requirement, to Doughnut Maker, which has a three month to six month experience requirement, and the job was classified under DOT No 526.684-010. AF 30. The CO said that the

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

definition of Cook, Pastry is used by the DOT to describe a worker who prepares and bakes cakes, cookies, pies, puddings, desserts, and other fancy pastries according to recipes. The CO explained that the DOT description of the work of a Doughnut Maker was, "Mixes, forms, and fries dough to produce doughnuts, according to work order," adding that this more accurately described the position stated in the Employer's application. AF 31. The CO then said that the successful preparation and baking of doughnuts in fast food establishments, such as that of the Employer, does not require the skill level of a worker who can bake successfully a large variety of desserts fancy pastries according to recipes. Based on this analysis, the CO found that the DOT's Specific Vocational Preparation (SVP) for a Doughnut Maker of three to six months' experience is more applicable to this position, and that Employer's requirement of two years' experience is excessive.

The application was then denied for this reason, subject to rebuttal by the Employer. The CO said Employer could rebut the finding of an unduly restrictive job requirement by submitting evidence that its experience requirement arises from a business necessity or by amending the requirement and re-advertising the position. AF 30-32.

Rebuttal. On September 26, 1995, the Employer submitted its rebuttal, which included a statement by Robert Tolentino, the Employer's treasurer and general manager, who said the two year requirement was necessary because the position is in the night shift, when the greatest quantity and variety of pastries are baked. AF 08, 10, 11. Employer also submitted copies of pictures of display cases with special holiday finishing to the pastries included in this activity. AF 12-16, 18-20. The rebuttal also included supporting letters from Asuncion A. Tolentino and Bernardo C. Perez, Jr., that set forth information corroborating the letter by Mr. Tolentino. AF 17-18. Employer also submitted recipes for baked items that included bagels, sweet yeast products, and bun dough. AF 14-29.

Final Determination. The CO's Final Determination (FD) denied certification on October 6, 1995. AF 05. The CO explained that the Employer's rebuttal evidence was not persuasive in establishing that the position was for a Cook, Pastry, since the recipes and pictures did not prove that any cakes, pies or a large variety of fancy pastries are baked or sold at Employer's establishment.³ The CO said the two letters of support were not

³While the CO also considered evidence from the "Dunkin' Donuts University" indicating that a five week training course fully qualified a prospective manager with the necessary skills in baking, bookkeeping, and managing a Dunkin' Donuts franchise, we do not find a connection between the qualifications for management and the qualifications for the position at issue. AF 07.

persuasive, since the main reason for requiring a longer period of experience in the job was the volume of baking to be done by the worker in this position.⁴ Finding that the Employer had failed to establish a business necessity for the two years of experience required for the position of a Doughnut Maker, rather than for a Cook, Pastry, the CO denied certification. AF 04, 06.

Appeal. Employer's October 24, 1995, request for review contended that the position is for a Cook, Pastry. AF 01, 02. Moreover, the Employer contended that the CO erred in relying on an ex parte communication with the Dunkin' Donuts University.

Discussion

Employer's contention that the CO erred in relying on a conversation with the Dunkin' Donuts University in denying this application for labor certification has merit. If a CO obtains evidence refuting an employer's rebuttal from any source that is not part of the evidence of record, he may not deny certification based on the new evidence without first issuing another NOF and giving the employer an opportunity to rebut. **Shaw's Crab House**, 87 INA 714(Sept. 30, 1988)(en banc). If a CO's Final Determination is based on evidence that the CO has failed to discuss in an NOF, the matter will be remanded to the CO for (1) clarification and (2) the issuance of a new NOF. **Serve Fashion, Inc.**, 90 INA 027(Dec. 7, 1990). It is elementary due process that the employer should "be advised of the evidence being used against him so that he may have the opportunity to rebut it." **Little Mermaid Restaurant**, 87 INA 675(Mar. 9, 1988). As BALCA observed in **Little Mermaid**,

A party is entitled, of course, to know the issue on which a decision will turn and be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses the opportunity offer a contrary presentation.

Id., citing **Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.**, 419 U.S. 281, 288 n 4 (1974). While the CO is not precluded from using evidence that was added to the record from a source other than the Employer, the Board simply held that an employer is entitled to rebut such evidence after having been given due notice in **Little Mermaid**. Supra.

⁴In addition, the CO noted that the letter from Ms. Tolentino indicates her employment is at the same premises as the petitioning Employer. For this reason the CO stated her letter was unpersuasive because she has a vested interest in this certification process.

The evidence of the Dunkin' Donuts University lends strong support to the CO's determination that the position is that of a Doughnut Maker and that the Employer's experience requirement is unduly restrictive in that the position offered does not require two years' experience. Consequently, the Employer in this case should have been given an opportunity to rebut this evidence, and the CO erred in first presenting this evidence in the Final Determination.

In addition, the Employer's contention that the position in question was that of a Cook, Pastry, also has merit, if proven. The position of Doughnut maker is defined in part in the DOT as follows:

Mixes, forms and fries dough to produce doughnuts according to work order: Dumps prepared doughnut mix into mixing machine bowl, adds water and dehydrated eggs, and starts mixer. Turns switch on heating unit of frying tank and sets thermostat at specified temperature. Dumps dough from mixing bowl into hopper of doughnut cutter. ... May glaze doughnuts, using hand dipper. May roll dough with rolling pin and form doughnuts with hand cutter. ...

No. 526.684-010 DOT at 369. The DOT definition of Cook, Pastry, is :

Prepares and bakes cakes, cookies, pies, puddings or desserts according to recipe; Measures ingredients, using measuring cup and spoons. Mixes ingredients to form dough or batter, using electric mixer, or beats and stirs ingredients by hand. Shapes dough for cookies, pies, and fancy pastries, using pie dough roller and cookie cutters or by hand. Prepares and cooks ingredients for pie fillings, puddings, custards or other desserts. Decorates cakes and pastries.

No. 313.381-026 DOT, at 243.⁵ In this case, the Employer relied on its position description in Part 13 of the application, as discussed above.

The record in this case requires as finding that distinguishes between the duties of a Pastry Cook and a Doughnut Maker. The DOT definition of Doughnut Maker is limited to the production of doughnuts. Cf supra. By contrast the DOT definition of Cook, Pastry, encompasses the production of a broad range of baked and other producing, including "desserts." The inclusion of desserts

⁵The DOT is merely a guideline and should not be applied mechanically. **Lev Timashpolsky**, 985 INA 033(Oct. 3, 1996); **Promex Corp.**, 89 INA 331(Sept. 12, 1990).

in this definition implies that cakes, cookies, pies, puddings" is not a complete list of the products made by Pastry Cooks, and suggests that such a worker could be expected to bake muffins and croissants, as well. Both the DOT definition of a Pastry Cook and Employer's description of the job duties in Part 13 of its application include the mixing of ingredients by use of an electric mixer or by beating the ingredients by hand. By contrast, the DOT description of the functions of a Doughnut Maker at this point says only, "Dumps prepared doughnut mix into mixing machine bowl, adds water and dehydrated eggs, and starts mixer." *Supra*. It follows that the definition of a Doughnut Maker describes a work that is less sophisticated and requires materially less skill than the work of a Pastry Cook. For these reasons, on remand the Employer should be given the opportunity to establish that the work that its employees in this position have historically performed encompass the same duties that were described in Part 13 of its application, and the CO should determine whether the Employer's job description describes full time employment based on the evidence of record. Accordingly, this issue should be revisited when this matter is reconsidered by the CO.

In denying certification in this case, the CO relied heavily on the characterization of Employer's business as a "franchise." Despite the fact that Employer's business is a franchise, it has argued that the stated requirements and duties essentially comport with the applicable DOT job description, and that the CO arguably is not even challenging the requirements of the position but the necessity of the job itself.⁶ While the nature of the Employer's business can play a role in certification, consideration of that role addresses a line of inquiry that is not concerned with the structure of the business: whether the Employer does in fact offer full time employment for a Pastry Cook, and whether the products other than doughnuts are made from scratch, a time consuming process that arguably could require the hiring of a full time Pastry Cook. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). The supporting issues in such an inquiry may require evidence as to whether Employer sells enough baked goods other than doughnuts to support the hiring of a full time Pastry Cook, and whether the products other than doughnuts are made from scratch. Also, even though the amount of the total sales of Employer's business may not be conclusive evidence, the total dollar amount of the sales produced by baked goods other than doughnuts may aid the CO in deciding whether Employer's offer constitutes full time employment.

⁶ It is well established that the CO is not permitted to challenge the necessity of the job itself when it has been established that a full time job does exist. **Ebedighani & Houda Abadi**, 90 INA 139 (June 4, 1991); **Dr. & Mrs. Shinn Shyng Chang**, 88 INA 536 (Sept. 21, 1989).

Accordingly the following order will enter.

ORDER

1. The Final Determination is hereby Vacated.

2. This application is Remanded to the Certifying Officer for such further proceedings as shall be consistent with this decision.

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No. 96 INA 079

R & D, INC, T/A/ DUNKIN' DONUTS, Employer
LOURDES TOLENTINO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:		:		:		:
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Thank you,

Judge Neusner

Date: August 21, 1997